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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-572

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Petitioners,

vs.

WILFRED KEYES, *et al.*

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents Keyes, *et al.* submit this Brief in Opposition to the Conditional Cross-Petition for a Writ of Certiorari.

Statement of the Case

On August 30, 1971 the Court of Appeals, in response to a motion by respondents which pointed out that no relief had been provided for state-imposed segregation at two elementary schools, Hallett and Stedman, ordered the trial court to hold a hearing and determine the proper relief to be granted.

Neither in opposition to respondents' motion to the Court of Appeals nor at the trial court hearing did cross-petitioners take the position that segregation had been

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sufficiently disestablished at Hallett. On September 27, 1971 the trial court issued its Order Re Desegregation of Hallett and Stedman Elementary Schools, which included a finding that *de jure* segregation still existed at those schools. Thereafter, on October 7, 1971, cross-petitioners filed a Notice of Appeal to the Court of Appeals.

After the filing of the Notice of Appeal petitioners' and respondents' counsel reached agreement upon a stipulation modifying the district court's order of September 27, 1971. The stipulation was accepted by the trial court and on October 15, 1971 it issued an Order modifying its previous Order in accordance therewith. Subsequently, the parties entered into a Stipulation for the dismissal of the appeal and on November 8, 1971 the trial court entered its Order Dismissing Appeal.

The statement appearing at page 9 of the Conditional Cross Petition relating to the result of the Hallett Plan is in error. The correct figures are as follows:

	% *Negro*	% *Hispano*	% *Anglo*
September, 1968	84.4	5.5	10.1
September, 1969	58.4	3.4	38.2
September, 1970	60.6	3.1	36.3
September, 1971	64.8	4.8	30.4

The Anglo enrollment figures for 1970 and 1971 include Anglos from the Montbello residential area who have no "neighborhood school" and who are assigned to Hallett; they are not participants in the voluntary Hallett Plan.

ARGUMENT

That the three questions presented by the cross petition are insubstantial is reflected by the conditional nature in which they are sought to be presented.

As set forth below, cross-petitioners' issues either: (1) are already fairly encompassed in the original Petition for Certiorari filed by respondents Keyes, *et al.*, No. 71-507; (2) present no conflict either among the Courts of Appeals or with the decisions of this Court; or (3) have been voluntarily settled and compromised by cross-petitioners and are therefore not properly subject to this Court's jurisdiction.

In their first question presented the cross-petitioners seek review of that portion of the opinion of the Court of Appeals of June 11, 1971 which affirmed the trial court's finding of intentional segregation of schools in the Park Hill area of Denver.

The legal theories applied to the facts by the trial court and affirmed by the Court of Appeals are entirely consistent with the decisions of other Courts of Appeals; *e.g., Taylor* v. *Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *United States* v. *School Dist. No. 151*, 404 F.2d 1125 (7th Cir. 1968), 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States* v. *Board of Educ., Tulsa*, 429 F.2d 1253 (10th Cir. 1970); *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573 (6th Cir.); *cert. denied*, —— U.S. —— (1971). All of the foregoing cases recognize that school authorities may not gerrymander school boundaries, manipulate the size of new schools and their attendance boundaries, or take other discriminatory action which the officials know will result in the isolation and segregation of schoolchildren accord-

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ing to their race. Indeed, it is the inconsistent application of the law to the facts found below which is a primary issue presented by the Petition for Certiorari filed by respondents Keyes, *et al.*

Similarly, the first question presented does not reflect a conflict between the opinion below and this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *Swann* clearly supports the decisions below on this question, recognizing that intentional segregatory acts of school authorities may require the intervention of the federal courts to restore constitutional rights:

> This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that when the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. 402 U.S. at 31-32.

Similarly, the second question presents no substantial issue. It deals with the trial court's discretion to formulate an appropriate remedy where the school authorities have failed and refused to come forward with a plan for relief of state-imposed segregation. Even at the preliminary injunction stage, the trial court clearly stated that the cross-petitioners could still adopt and implement another plan "embodying the underlying principles" of the withdrawn plan, if it so desired. Appendix to Petition in No. 71-507, p. 18a; see also, p. 37a. The cross-petitioners having refused assistance to the trial court, now seek to contest the relief granted. That relief was clearly within the district court's discretionary powers, and the Court

of Appeals found no abuse of discretion. Cf. *Swann*, 402 U.S. at 16:

> In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

As to the third question raised in the cross-petition, as described above the trial court's Order of October 15, 1971 was the result of a voluntary stipulation between the cross-petitioners and respondents, a condition of which was that cross-petitioners would withdraw their Notice of Appeal from the September 27 order. The notice was withdrawn and the appeal dismissed on November 8, 1971 by Order of the district court entered on the basis of a Stipulation of November 5, 1971.

Clearly by their acts the cross-petitioners should be held to have waived any objections to the plans for Hallett and Stedman, and such issue is consequently not properly before this Court.

Even if respondents are in error as to the effect of the voluntary dismissal of the appeal below, the record clearly supports the decisions below that there was no sufficient disestablishment of segregation at Hallett, and that in fact such segregation was increasing from the September, 1969 level. Where freedom of choice has failed to disestablish segregation the trial court clearly has the power to impose an effective remedy. *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968).

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CONCLUSION

Contrary to the cross-petitioners' assertion that the decisions below have intruded into and usurped the discretionary powers of school authorities, respondents respectfully contend that under the authority of the decisions of this Court and the Courts of Appeals the courts below failed to go far enough to remedy the constitutional deprivations demonstrated by the record below. The cross-petition presents no substantial issue which is not already presented in the Petition for Certiorari of Keyes, *et al.*, No. 71-507.

For the foregoing reasons, respondents pray that the cross-petition for certiorari be denied and that the main Petition in No. 71-507 be granted.

Respectfully submitted,

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